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THE GREAT IMPORTANCE OF HAVING MORE JUDGES IN SOME OF OUR STATES AND BETTER PAY.

It is an oft repeated remark that the opinions of the judges of an earlier day show a deeper consideration and more careful work generally than those of recent years. The reason is plain enough. Our judges of today have, man for man, infinitely more work to do and a greater demand upon their time, and are victims of too much law made by legislatures and courts, while the old time judges had a deeper knowledge of fundamentals. We are apt to think with the progress of time we are moving away from the principles which guided our fathers in their judgments. We forget that Rome developed arts and sciences which modern effort has failed to equal and that the philosophy of the law was never better known than in the days of Justinian, who saw the necessity of gathering the best principles into form from the masses of opinions of great legal lights, as clashing and conflicting as those which in modern times confuse and befog the minds of our judges and thus constantly add to the existing chaos. Codes have been introduced to escape from the perplexities which grew up with the common law procedure, but the codes in most states have proven a delusion and a snare because of the manner of their interpretation and the ineffectual efforts of legislatures to afford relief. The most important function of government is the securing of wise laws. It must then be apparent that the securing of men of high moral principles and conceptions, deeply learned in the fundamental principles of the law, should be the chief endeavor of political policy. We refer particularly now to the courts of last resort. This body should not be overworked, but be made large enough to have ample time for the consideration of every case brought before it. The salaries provided for in the earlier days were sufficient for the times, but a vast difference in the cost of living and other demands upon the judiciary make the office undesirable for the lawyer, as a rule, the best fitted for the position. The present salaries of our supreme judges in most of the states are not sufficient to cover the demands upon him. It is good economy to secure the best ability for the bench. A judge who has to learn fundamental principles after he has gone on the bench, clogs the progress of the court's business if he does conscientious work and it is better to go slow and be sure than to rush through ill considered opinions. A bull turned loose in a china shop could not begin to create the havoc that a judge may, who slashes around among the "*datum posts*" of the law which centuries of wise men have established. There is great need in several of our states for a constitutional convention, were it called only for the purpose of re-establishing their judicial systems. It would be a good thing for many of our states to completely wipe out their past records and begin over on a new basis, with the fundamental principles and the recognized leading cases to work on and a sufficient body of judges to promptly decide appeals. It would save an immense amount of work in efforts to reconcile clashing opinions. The English judicature act, is as simple a plan of procedure as could be introduced, and eventually it might be established in all our courts, both federal and state, great care being exercised in the federal courts in the selection of judges. Their opinions would be reliable precedents to keep all in accord. In su h ways our laws could be simplified and harmonized to the great benefit of the profession everywhere, and need of so many books done away with. The work of the judges would be greatly simplified and the progress of opinion writing facilitated. The writing of legal opinions requires the highest order of ability and great pains and care. In the effort to keep up with the work it is not surprising that many mistakes are made, and that in the attempt to discriminate between conflicting opinions the best course is frequently not adopted. The matter of having good laws is of such vast importance that in these days of reform movements it is incumbent upon the members of the bar everywhere, to give the most careful consideration and exert themselves to see that there is no failure in this respect.

NOTES OF IMPORTANT DECISIONS.

GAME AND FISH—VALIDITY OF ACT REGULATING SAME.—An interesting case is that of State v. Tower Lumber Co. (Minn.), 110 N. W. Rep. 254. The action was one to recover damages from the defendant for interfering with the plans of the game and fish commission in the performance of their duties. The defendants were engaged in the lumber and logging business on Pike river. The state owned two fish hatcheries for the purpose of stocking the lakes and streams of the state with fish fry. During the month of April a large number of fish belonging to the pike family ascend the river above mentioned to the falls, some distance from its mouth, for the purpose of spawning, at which time the officers of the state, through the game and fish commission are able to obtain large quantities of spawn for hatching and supplying the lakes of the state. During the period from the 23rd to the 28th of April, 1905, the said commission undertook the task of catching fish at this place and was interfered with by the defendants a properly organized corporation of Minnesota which persisted in floating down logs and thus obstructed the work of the game commission. This corporation had expended a considerable sum of money getting the river in shape for their purposes. It was set up that it was unnecessary for the defendants to float down their logs at that particular time. The action was founded upon the provisions of section 56, ch. 344, p. 624, Laws 1905, which provides as follows: "Sec. 56. Obstructing Commission—Gathering Spawn—No person shall obstruct the commission, its executive agent or any warden appointed by it while engaged in gathering fish spawn, nor shall any person place in any stream or river any logs or other debris at any time when said commission and its employees are gathering spawn, or about to gather spawn or catch fish for that purpose in any such stream or river. Any person violating any of the provisions of this section shall be deemed guilty of a misdemeanor. The commission may institute a civil action in the name of the state to recover from any person or persons obstructing it in the performance of its duties, or who shall place logs or other debris in such stream, for all damages resulting therefrom, and in addition thereto may in such action enjoin such party or parties from doing the acts hereby prohibited." The court said:

"It is urged by defendants in support of the demurrer to the complaint (1) that chapter 344, of which the section in question forms a part, is unconstitutional and void, for the reason that the title thereof is not sufficiently broad and comprehensive to justify the enactment of this particular section; and (2) if this contention is not sustained, that the section is unconstitutional and void, in that (a) it violates section 10 of article 1 of the constitution of the United States, prohibiting a state from passing any law impairing the obligation of contracts, (b) it violates the fourteenth amendment to the constitution of the United States, in that it deprives defendants of their property without due process of law, and (c) it violates section 13 of the constitution of Minnesota, which provides that private property shall not be taken or damaged for public use without just compensation first paid or secured.

1. The title to the act is as follows: 'An act for the preservation, propagation, protection, taking, use and transportation of game, fish and certain harmless birds and animals.' The statute enacted under this title is a comprehensive game law, providing for the preservation and protection, and restricting the time and manner in which wild game may be taken, and imposing numerous penalties for a violation of its various provisions. Section 56, here before the court, is a necessary detail of the legislation and pertinent to the general subject as expressed in the title. Under the numerous decisions of this court we have no difficulty in holding it amply sufficint. State v. Board of Control, 85 Minn. 165, 88 N. W. Rep. 533; Ek v. St. Paul Loan Co., 84 Minn. 245, 87 N. W. Rep. 844; Winters v. City of Duluth, 82 Minn. 131, 84 N. W. Rep. 788; State v. Cassidy, 22 Minn. 312, 21 Am. Rep. 765.

2. The question whether the statute is unconstitutional and void in the respects contended by defendants depends, in a measure, on its construction. Other sections of the statute of which this forms a part authorize the game and fish commission to gather spawn for the purpose of stocking the lakes of the state with fish fry, and the section under consideration provides that no person shall obstruct the commission, its executive agent or any person appointed by it while engaged in gathering the same, nor shall any person place in any stream or river any logs or debris at any time when the said commission and its employees are gathering spawn, or are about to do so; and a penalty is provided for its violation. It is urged in support of the claim that the statute violates the several provisions of the constitution referred to, that it grants to the commission arbitrary powers, and enables its members wrongfully, unnecessarily and capriciously to interfere with defendant's business and indefinitely to tie up their affairs by a simple notice that its agents intend to gather spawn in the river at such time or times as may seem convenient to them. We construe the statute not to grant the arbitrary powers suggested, but as a reasonable regulation of the use of the river. There can be no question of defendants' right to make use of the stream for the orderly conduct of their business, nor can there be any doubt of the authority of the state in the exercise of the police power, to provide that during the time its game and fish commission is engaged in the work of gathering spawn, as provided by statute, persons making use of the river shall suspend for a reasonable time such operations thereon as will, if carried on, interfere with the work of the commission. If the

statute were to be construed in accordance with its strict letter, to the effect that a mere deposit of logs in the stream at a time when the commission is employed in its labors, without regard to whether such act would in any manner interfere with the commisson, there would be merit in the contention of defendants. But we do not give the statute that interpretation. It must be given a liberal construction. Its main purpose was to regulate the conduct of those making use of the river during the time the commission was engaged in its work, and to prohibit any and all such persons from unnecessarily interfering with its work. The commission must act reasonably and engage in no arbitrary conduct or unreasonable delay in its work. A reasonable consideration of the rights of all parties is all the statute seeks to require, and this should be observed by its members. So construed, the statute is obviously not obnoxious either to the state or to the federal constitution. The river in question is a public highway, within the meaning of section 2385, Gen. St. 1894, and subject in its use by the public to such reasonable regulations as the legislature may impose. It does not matter in the case at bar that the defendant boom company is a corporation created for the express purpose, and with special contractual rights and privileges in the use of this particular stream. Georgia Banking Co. v. Smith, 128 U. S. 179, 9 Sup. Ct. Rep. 47, 32 L. Ed. 377; Gladson v. Minnesota, 166 U. S. 430, 17 Sup. Ct. Rep. 627, 41 L. Ed. 1064. It has no exclusive right to the use of the stream, but its possession and use thereof is subject to reasonable legislative regulation. Osborne v. Boom Co., 32 Minn. 412, 21 N. W. Rep. 704, 50 Am. Rep. 590; Crookston Water Co. v. Sprague, 91 Minn. 461, 98 N. W. Rep. 347, 99 N. W. Rep. 420, 64 L. R. A. 977, 103 Am. St. Rep. 525. It is thoroughly settled that acts of the legislative department of government designed for the protection and preservation of game and fish are valid as an exercise of the police power. State v. Rodman, 58 Minn. 393, 59 N. W. Rep. 1098; Lawton v. Steele, 152 U. S. 133, 14 Sup. Ct. Rep. 499, 38 L. Ed. 385; Wisconsin v. Jacobson, 179 U. S. 287, 21 Sup. Ct. Rep. 115, 45 L. Ed. 194 (71 Minn. 519, 74 N. W. Rep. 893, 40 L. R. A. 389, 70 Am. St. Rep. 358). And it is equally well settled that an exercise of that power, when public interests require its exercise, cannot be contracted away, and whatever contract rights the boom company may have in the premises, they are subordinate to the rights of the state in this respect. It appears from the complaint, as already indicated, that the spawning season for pike in the river in question is during the latter part of April of each year, and continues for a period of about a week; that large numbers of fish then congregate below the falls of this river and present the only opportunity of taking them. The spawn cannot be collected at any other time, and unless it is within the power of the legislature to prohibit an unnecessary interference with the work of the commission during that period the interests of the fish industry would be seriously hampered and damaged. To require defendants, and all other persons, to desist from floating logs down the river during the period stated is, we think, a reasonable requirement, and the statute is not obnoxious to any of the provisions of the constitution of the state or of the United States pointed out by appellants."

THE PREVENTION OF TRUSTS AND MONOPOLIES.

The great problem of today is how to save industrial operators (corporate as well as individual), from the crushing power of those abnormal combinations of capital known in recent years as "trusts" and "monopolies." Inasmuch as most of the manufacturing industries of the country are now, and will continue to be, under the management of corporations normal corporations are even more interested than individual operators in the solution of this problem. Free and fair competition is essential not only to reasonable prices to the community but also to the existence and prosperity of normal corporations, especially in the south and west.

At the outset we should have a clear understanding of what, in its modern commercial sense, is a "trust." The Century Dictionary defines it as follows: "An organization for the control of several corporations under one directory by the device of a transfer by the stockholders in each corporation of at least a majority of the stock to a central committee or board of trustees, who issue in return to such stockholders respectively certificates, showing in effect that, although they have parted with their stock and the consequent voting power, they are still entitled to dividends or to share in the profits—the object being to enable the trustees to elect directors in all the corporations, to control and suspend at pleasure the work of any, and thus to economize expenses, regulate production, and defeat competition." This trust combination, wherever a competing corporation refuses to join it, puts down below cost the price of the products of that industry in the locality of the competing corporation, and keeps it down in that locality until the competing corporation is forced to join the combination or quit the business. In this

way competing corporations, one after another, are compelled to yield to the trust. And when all competition is destroyed and the managers of the combination, by limiting the products of each of its members or by closing the works of some of them, lessen the output and raise the prices at pleasure, the trust becomes a monopoly.

And what is a monopoly? The Standard dictionary gives the following definitions: 1. "In political economy, such control of a special thing, as a commodity, as enables the person or persons exercising it to raise the price of it above its real value, or above the price it would bring under competition." 2. "A company or combination in possession of a monopoly; as in the grasp of a gigantic monopoly." Accordingly a company (like the Standard Oil Company), formed with the purpose, and having by its aggregation of hundreds of millions of dollars, the power to control the output and price of a commodity, is a monopoly.

Trusts and Monopolies Illegal at Common Law.—But a combination of several individuals or corporations for the purpose of destroying competition and in order to limit the production and control the prices of some necessary or convenience of life, has always been treated by the common law as a menace to the public welfare, against public policy and illegal. And monopolies have always been held to be "against the common law." Trusts and monopolies, therefore, cannot legally exist in the absence of positive legislation in their behalf. In other words, there is no such thing as a legal trust or a legal monopoly without "paternal legislation."

Monopolies Upheld in New Jersey.—Since trusts and monopolies are illegal at common law, these combinations before they can lawfully operate must go to some state and get legislative authority to organize with such "large aggregations of corporate capital," as would enable them to "destroy competition," by an entirely lawful method.

Several of the states, including Texas, Arkansas, Tennessee and North Carolina, have solemnly declared in their constitutions that "monopolies shall not be allowed," and in nearly all the other states, the courts would hold as the Supreme Court of Illinois has held: "To create one corporation that it may destroy the energies of all other corporations of a given kind, and suck their life blood out of them, is not a lawful purpose.[1] The captains of monopoly pass by these states, go to New Jersey and induce the legislature of that state to enact laws whereby huge corporations can be organized for the purpose of taking in all the industrial plants in the same line of business throughout the whole country. And such legislation is upheld by the highest court of New Jersey. In an opinion of the court filed July 7, 1899, it is said: "Under our liberal corporation laws, corporate authority may be acquired by aggregation of individuals, organized as prescribed, to engage in and carry on almost every conceivable manufacture or trade. Such corporations are empowered to purchase, hold, and use property appropriate to their business. They may also purchase and hold the stock of other corporations. Under such powers it is obvious that a corporation may purchase the plant and business of competing individuals and concerns. The legislature might have withheld such powers, or imposed limitations upon their use. In the absence of prohibition or limitation of their powers in this respect, it is impossible for the courts to pronounce acts done under legislative grant to be inimical to public policy. The grant of the legislature authorizing and permitting such acts must fix for the courts the character and limit of public policy in that regard. It follows that a corporation empowered to carry on a particular business may lawfully purchase the plant and business of competitors, although such purchase may diminish, or for a time, at least, destroy competition."[2] According to this decision the corporations organized with monopolistic powers under the laws of New Jersey, being in accord with the public policy of that state, are legal, although formed for the purpose of cornering and controlling our principal industries and although against the public policy of nearly all the other states.

And in Pennsylvania.—The justices of the Supreme Court of Pennsylvania in an opinion filed December 31, 1904, declared without a dissenting voice that the public policy of that state "is to encourage and promote large aggregations of corporate capital." This is

[1] 130 Ill. 268, 298.

[2] Trenton Potteries Companies v. Olyphant, 58 N J. Eq. 507, 43 Atl. Rep. 723.

their language: "As we understand the public policy of this commonwealth, both as disclosed in the constitution of 1874 and as apparent in all the legislation since, it is to encourage and promote large aggregations of corporate capital for the development of all the commonwealth's resources. * * * The professed purpose in organizing these large corporations is, not to kill competition, but to cheapen production in the interest of the public. Yet, whatever the real purpose, competition is stopped by an entirely lawful method. * * * If competition has been largely suppressed, if the courts more liberally interpret in their application the common law rules on the subject of monopoly, it is only because a more rigorous interpretation would defeat the true intent and meaning of our constitutional and statutory legislation on the subject. Our decisions on this subject may not be in accord with those in some other states, and possibly not in accord with those in the federal courts, but in so far as they affect matters only within the territorial jurisdiction of this commonwealth, and do not conflict with the constitution of the United States or statutes adopted in pursuance thereof, we believe they are sound, because in accord with the public policy of this state, and we shall adhere to them."[3]

Since a corporation organized in New Jersey or Pennsylvania with unlimited power to aggregate capital in its business is a legal person with the constitutional rights of a person, (14th amendment, Sec. 1) and since the Supreme Court of the United States has held[4] that the Federal Act of 1890 "to protect trade and commerce against unlawful restraints and monopolies" does not apply to a company engaged in one state in the refining of sugar because the refining of sugar bears no direct relation to commerce between the states—in other words, since this court has held that a combination to control the production of an article only indirectly affects interstate commerce, and is not a subject for federal legislation, what power is there anywhere in this country, under the constitution of the United States, as it now stands, to prevent and suppress monopolistic corporations while a single state like New Jersey or Pennsylvania is willing to create and maintain them?

The sovereign people of the United States, while professing to give our national legislature the power "to regulate commerce among the several states," have really left to each state the uncontrolled power to organize and foster monopolistic corporations for the control of the various industries whose products enter into interstate traffic and become the principal part of the commerce of the whole country.

Can the People of the United States Prevent Trusts and Monopolies.—In view of the strong positions trusts and monopolies have gained and hold in New Jersey and Pennsylvania under and by virtue of legislative enactments and judicial decisions, two questions arise:

First. Can the people of the United States limit the capacities and powers now given to capitalists when they assume the form of industrial corporations?

Second. If they can do this, would it be good policy to so limit their capacities and powers as will prevent and suppress monopolies?

The first of these questions may be readily answered. In this country the people are sovereign. They can make and unmake constitutions and laws for the control of corporations—mere artificial beings created by legislative action. They can amend the constitution of the United States and give to congress the power to prevent and suppress monopolies throughout the United States by appropriate legislation. The power is unquestionable. And this brings us to the second question. Would it be good policy to exercise this power?

With such an amendment the general government could so limit the powers and capital of industrial corporations as to prevent their becoming or being monopolies in any of the states.

Limitations of corporate powers and capital are necessary for the free play and preservation of competition. Competition in any line of business may be destroyed, as we have seen, by the combination of corporations in that line in the form of a "trust" or by their transformation into one organic body. To preclude such centralization, congress could, by penal provisions, prevent corporations

[3] Monongahela River Consolidated Coal and Coke Co. v. Jutte, 210 Pa. St. 288, 59 Atl. Rep. 1088.

[4] United States v. E. C. Knight Co., 156 U. S. 1.

from combining in any manner their powers and business under one management, from purchasing the plants of other corporations, from allowing anyone to hold stock at the same time in more than one corporation in the same line of business, and from branching out into any business other than the kind for which they were organized. Congress could classify corporations in view of the character of the industry, and accordingly fix limits to the amount of the capital to be employed. For instance, congress, with the aid of experts, could make full investigation as to the amount of capital reasonably required to operate successfully one of the largest coal mines in the country, and then fix that amount as the limit of the capital of coal mining corporations. There is really no necessity for a large amount of capital where the corporation is purely a private one and the industry, such as furnishing the public with oil, refined sugar, beef, matches, and the like, could be profitably carried on by partnerships and unincorporated companies. In such cases an unlimited amount of capital and large accumulations of undistributed earnings tempt and enable the so-called "captains of industry" to resort to the various recently exposed unfair, dishonorable, and dishonest means, devised and practiced by them, for the purpose of destroying competition, establishing monopolies, and individually becoming millionaires.

Such limitations as above suggested may be characterized by the "captains of monopoly" as paternalism. But the very creatures of "paternal legislation" are not the ones to denounce paternalism.

An amendment empowering congress to so limit the powers and capital of industrial corporations throughout the United States as to prevent their becoming or being monopolies, would still leave in the several states the power to create corporations with such capacities and powers as they may respectively see fit to give them, subject to the limitations that might be prescribed by congress for the prevention and suppression of monopolies.

The Anthracite "Coal Combine."—All the anthracite coal fields in this country are within the state of Pennsylvania. This kind of coal, by its extensive use throughout the country, has become a prime necessity, not only for domestic, but also, especially in the eastern states, for manufacturing purposes. In accordance with the modern policy of the state of Pennsylvania, the supply of hard coal for the whole country has come under the control of a "coal combine" directed by some half a dozen millionaires. They determine the operations of these coal corporations. Whether or not we shall have, from time to time, "coal famines" like that of 1902, will depend upon their action. Here is the centralization in a few men of a power capable of being used with relentless obstinancy and enormous loss to the whole country. The state of Pennsylvania, with its modern policy in favor of "large aggregations of corporate capital," will not, and the national government cannot, control these "combined" coal corporations. The result is that their directors are the autocrats of this industry. And this is but one instance of the centralization in a few men of autocratic power to control the industries of the country.

Monopolies Denounced by Many of the States as "Contrary to the Genius of a Free Government." — The people of the several states believe in the distribution of opportunity to acquire wealth honestly, and not in the centralization of power to take it arbitrarily. The state of Texas is as much opposed to the oil trust and monopolistic corporations generally as the state of Kansas. The state of Texas in her constitution has said: "Perpetuities and monopolies are contrary to the genius of a free government, and shall never be allowed."[5] The state of Arkansas in her fundamental law, has also said: "Perpetuities and monopolies are contrary to the genius of a republic, and shall not be allowed."[6] Tennessee[7] and North Carolina[8] have made the same declaration, merely using the term "free state" instead of "free government" or "republic." And Missouri in her declaration of rights has said: "The exercise of the police power of the state shall never be abridged, or so construed as to permit corporations to conduct their business in such manner as to infringe the equal rights of individuals or the general well-being of the state."[9] What is

[5] Art. 1, sec. 26.
[6] Art. 11, sec. 19.
[7] Art. 1, sec. 22.
[8] Art. 1, sec. 31.
[9] Art. 12, sec. 5.

this but another way of stating that corporations shall not be allowed by legislative action, or judicial construction, or change of public policy, or unfair methods in the conduct of their business, or in any manner, to destroy industrial competition, and thus become monopolies. "All the authorities," says Chief Justice Fuller in delivering the opinion of the Supreme Court of the United States, "agree that in order to vitiate a contract or combination it is not essential that its results should be a complete monopoly; it is sufficient if it really tends to that end and to deprive the public of the advantages which flow from free competition."[10] In the case of the People v. Chicago Gas Trust Company, the Supreme Court of Illinois says: "Of what avail is it that any number of gas companies may be formed under the general incorporation law, if a giant trust company can be clothed with the power of buying up and holding the stock and property of such companies, and through the control thereby attained, can direct all their operations and weld them into one huge combination? * * * To create one corporation that it may destroy the energies of all other corporations of a given kind, and suck their lifeblood out of them, is not a lawful purpose."[11]

According to these authorities all combinations under one directory formed for the purpose of destroying competition and having sufficient capital to accomplish that purpose are monopolistic in their tendency and should in every state in the union be treated as monopolies. We believe that the states, which have so positively declared that monopolies shall not be allowed, will aid the other anti-monopoly states in giving to the general government the power to prevent and suppress monopolies; especially after they have learned by experience that they cannot, by their own unaided efforts, effectually prevent New Jersey monopolies from destroying their own individual and normal corporate enterprises. It would be no denial of state rights to deny to these states the power to create and uphold monopolies. Indeed, such a power in a republic—in any state in the union—is no right at all in the proper sense of the word.

"*The United States Shall Guarantee to Every State in This Union a Republican Form of Government.*"—Moreover, it is a question worthy of consideration whether in any state in this union, a power to inaugurate and maintain a system of legislation designed to destroy free competition and enthrone monopolies, is permissible in view of the following constitutional provision framed by the fathers for the protection of republican institutions in all the states: "The United States shall guarantee to every state in the union a republican form of government."[12]

Republican governments are instituted for the protection of life, liberty and property from autocratic power. When the public policy of a state is so changed by its legislative and judicial action as to make life, liberty or property liable to be destroyed by autocratic power, can it any longer be properly called a republican state? If a state should give to a natural person autocratic power over the property of its citizens or over the means of acquiring and possessing property, would it in that respect be a republican government? What substantial difference would there be between such a case and one where a state gives a like autocratic power to an artificial person—a monopolistic corporation of its own creation. By a change of its governmental system from the public policy—the people's policy—of free industrial competition to the policy of fostering monopolies with their autocratic powers, does not a state, in repect to the protection of property, depart from a republican system of government?

A Monopoly in an Ordinary Business is "Against Common Right and Void."—Whatever view, however, may be taken of the scope of this constitutional provision, life, liberty and property in a republic are equally and alike entitled to governmental protection from the crushing power of monopolies. The bill of rights of Virginia, in 1776, declared and still declares, "that all men * * * have certain inherent rights, of which, when they enter into a state of society, they cannot, by any compact, deprive or divest their posterity, namely, the enjoyment of life and liberty, with the means of acquiring and possessing property, and pursuing and obtaining happiness and safety." The constitution of Kentucky declares, in its bill of rights, "that absolute, arbitrary power over the lives, liberty and property of freemen exists nowhere

[10] 156 U. S. 1, 16.
[11] 130 Ill. 268, 297-8.
[12] Art. 4, sec. 4.

in a republic, not even in the largest majority." The arbitrary power given to monopolistic corporations for the very purpose of destroying industrial competition and thereby depriving freemen from "the means of acquiring and possessing property" in their chosen business or pursuit will find no support in the doctrine of state rights as understood in Virginia and Kentucky. And if there are any states in the union more devoted than the others to the doctrine of states rights they are Virginia and Kentucky.

In the case of the Crescent City Live Stock Landing and Slaughter-House Company,[13] where the Supreme Court of the United States unanimously decided that certain monopoly features of the act incorporating the company were invalid, but some of the justices gave separate opinions stating the grounds of their concurrence in the decision, Mr. Justice Field said: "As in our intercourse with our fellowmen certain principles of morality are assumed to exist, without which society would be impossible, so certain inherent rights lie at the foundation of all governmental action, and upon a recognition of them alone can free institutions be maintained. These inherent rights have never been more happily expressed than in the declaration of independence, that new evangel of liberty to the people: 'We hold these truths to be self-evident,' that is, so plain that their truth is recognized upon their mere statement, 'that all men are endowed;' not by edicts of emperors or decrees of parliament or acts of congress, but 'by their Creator, with certain inalienable rights,' that is, rights which cannot be bartered away or given away or taken away except in punishment of crime; 'and that among these are life, liberty and the pursuit of happiness, and to secure these,' not grant them, but secure them, 'governments are instituted among men, deriving their just powers from the consent of the governed.' Among these inalienable rights, as proclaimed in that great document, is the right of men to pursue their happiness, by which is meant the right to pursue any lawful business or vocation, in any manner not inconsistent with the equal rights of others, which may increase their prosperity or develop their faculties, so as to give to them their highest enjoyment. * * * Whilst, therefore, I fully concur in the decision of the court that it was entirely competent for the state to annul the monopoly features of the original act incorporating the plaintiff, I am of opinion that the act, in creating the monopoly in an ordinary employment and business, was to that extent against common right and void." In the same case Mr. Justice Bradley (with whom Mr. Justice Harlan and Mr. Justice Woods concurred) said: "I hold it to be an incontrovertible proposition of both English and American public law that all mere monopolies are odious and against common right. * * * The right to follow any of the common occupations of life is an inalienable right; it was formulated as such under the phrase 'pursuit of happiness' in the declaration of independence, which commenced with the fundamental proposition that 'all men are created equal; that they are endowed by their Creator with certain inalienable rights; that among these are life, liberty and the pursuit of happiness.' This right is a large ingredient in the civil liberty of the citizen. To deny it to all but a few favored individuals, by investing the latter with a monopoly, is to invade one of the fundamental privileges of the citizen, contrary not only to common right, but, as I think, to the express words of the constitution. * * * Monopolies are the bane of our body politic at the present day. In the eager pursuit of gain they are sought in every direction. They exhibit themselves in corners in the stock market and produce market and in many other ways. If, by legislative enactment, they can be carried into the common avocations and callings of life, so as to cut off the right of the citizen to choose his avocation, the right to earn his bread by the trade which he had learned; and if there is no constitutional means of putting a check to such enormity, I can only say that it is time the constitution was still further amended." In the case of Mobile & Ohio Railroad Company v. State of Tennessee,[14] the Supreme Court, *per* Mr. Justice Jackson, say that the fourteenth amendment of the constitution of the United States "conferred no new and additional rights, but only extended the protection of the federal constitution over rights of life, liberty and property that previously existed under all state constitutions."

Since monopolies are against "common right" and since the right of industry—the

[13] 111 U. S. 746.

[14] 153 U. S. 486, 506.

right of competition in all ordinary industrial pursuits—is both a liberty and a property, and is entitled to protection "under all state constitutions," the action of the state legislature and judiciary of New Jersey in recent years in changing the free public policy of the common law to that of creating and upholding gigantic corporations designed to destroy all competition, is really a usurpation on the part of the state legislature upheld by the state judiciary, and can receive no support from the true Jeffersonian advocates of state rights.

The autocracy and bureaucracy of the captains of monopolies and their boards of directors have no rightful place in any free state. They are in fact the most serious menace of our time to republicon institutions. Autocracy and bureaucracy in the industrial world are fully as dangerous as autocracy and bureaucracy in the political world. Is it not true that men are even more tenacious of their industrial than of their political rights? Give a man free and equal opportunity with his fellow-men and normal corporate persons to acquire and possess property, and he will generally be contented and peaceful under any system or form of government.

Congress Should be Empowered to Prevent and Suppress Monopolies by Appropriate Legislation.—In view of the undemocratic, unrepublican and dangerous character of monopolies and the vicious policy that fosters them, is there any good reason against the adoption of an amendment authorizing congress to prevent and suppress monopolies throughout the United States by appropriate legislation. Such an amendment, without taking from any free state any real right, would allow congress, the common representative of all the states, to so safeguard and limit corporate capacities and powers as would preserve industrial competition and prevent monopolies. It would only be in support and furtherance of the objects sought to be attained by these provisions of the federal constitution: "The United States shall guarantee to every state in the Union a republican form of government."[15] "Nor shall any state deprive any person of life, liberty or property, without due process of law."[16]

[15] Art. 4, sec. 4.
[16] 14th Amendment.

Before the monopolistic corporations and combinations created and fostered by the legislative action and vicious policy of New Jersey and Pennsylvania can be prevented and suppressed, an amendment for this purpose must be adopted. It might be in either of the following forms: "The congress shall have power to limit and regulate industrial corporations throughout the United States." "The congress shall have power to prevent and suppress monopolies throughout the United States by appropriate legislation." The former would be more comprehensive, but inasmuch as so many of the states are already committed against monopolies by the declaration of rights in their several constitutions, the latter, being simply aimed at monopolies, might be preferred.

Commercially we are one people. From a commercial point of view state lines are just as invisible as county lines. New York, Chicago, New Orleans and San Francisco are business neighbors and are not pent up by state lines. Since our industries are to be mainly conducted by corporations—artificial beings created by law and endowed with the capacity to manufacture articles and transact business as persons throughout the United States, the general government should be empowered to prevent monopolies and thus secure equal opportunity and free competition in industrial pursuits and consequently the natural distribution of corporate as well as individual wealth throughout the several states.

Trusts and monopolies, instead of being the outgrowth of the natural laws of trade, are the outgrowth of unlimited powers of combination granted to capitalists engaged in private and *quasi*-public enterprises. They are the outgrowth of state legislation in favor of "large aggregations of corporate capital" whereby capitalists in any kind of industry are enabled to combine and control that industry throughout the country. They are the outgrowth of "paternal legislation" and a vicious policy whereby, and thus only, it is possible for a few multi-millionaires to destroy competition, centralize the control of industrial enterprises and virtually tax at pleasure the products of every industry they monopolize. They can and in due time will be constitutionally suppressed by the sovereign people of the United States.

Bloomington, Ill. R. M. BENJAMIN.

WATER COURSES — WHAT CONSTITUTES — QUESTION FOR JURY.

WEBB v. CARTER.

St. Louis Court of Appeals, Missouri, Dec. 11, 1906.

In an action for damages caused by the obstruction of a slough a petition that did not allege that the slough was a natural water course or describe it as such, but described it as a swale or slough which received overflow water from a creek, was insufficient to raise an issue as to whether or not the slough was an actual water course or to support recovery, on the theory that it was.

One may recover damages resulting from the obstruction of a natural water course, however carefully the obstruction may have been made.

In an action for damages for the obstruction of a slough, the court should have instructed what acts under the pleadings would constitute negligence on defendants' part, and erred in referring the jury to the petition to ascertain what defendants' alleged negligence was.

GOODE, J.: Plaintiff owns the N. 1-2 of the N. E. 1-4 of section 21, and the N. W. 1 4 of section 22, township 29, R. 2 E., in Reynolds county, Mo., through which Logan's creek runs in a southerly direction. On the east side of the creek plaintiff had a field of 20 acres in cultivation. In January, 1903, defendants erected a saw mill on the west side of the creek, a short distance above plaintiff's land. The mill stands several rods back from the creek. Some distance above the mill a swale or slough starts from the west bank of the creek, runs south, past the mill, and empties into the creek a considerable distance below plaintiff's land. In time of freshets much of the surplus water from the creek passes out through this slough and on south of plaintiff's land. The evidence shows that where the swale passes by the mill, defendants built a tramway across it eight or nine feet high, and stacked railroad cross-ties and piles of lumber from eight to ten inches apart, and from five to six feet high, along on said tramway. In March, 1904, there was an unusual freshet in Logan's creek causing the creek to overflow and its waters to extend from hill to hill, a distance of 1,485 feet at the mill. Plaintiff's evidence tends to show that the cross-ties and lumber stacked across the slough by the defendants caused the water in the creek to form an eddy at that point, and to back up and force the current of the creek to the southeast and over and across the plaintiff's field, washing away all the soil and leaving the field worthless. The evidence also shows that the east bank of the creek, on which plaintiff's field abutted, was from three to four feet higher than the opposite bank. It also shows that a four-foot rise in the creek would cause the water to flow through the slough, and that previous overflows from the creek had never damaged plaintiff's field. There was some counter-vailing evidence offered by the defendant. All the witnesses agreed that the slough receives all its water from Logan's creek, and that water never flows through it except when there is a four-foot rise or over in the creek; and in dry weather the slough is dry. "Plaintiff for his cause of action states that on or about the —— day of January, 1903, defendants erected a sawmill and lumber yard upon a part of the lands aforesaid, lying west of said Logan's creek and near to the slough above described; that defendants, at the time of the erection of said sawmill and lumber yard, well knew that said Logan's creek was subject to overflow, and that when the same did overflow, there was a strong flow or current of water through said slough; that notwithstanding defendants' knowledge of said conditions, on or about the —— day of ——, 1903, defendants negligently and carelessly stacked a large quantity of heavy square green oak timbers in one continuous stack or pile, of the dimensions of about 12 feet high and 20 feet wide, extending from their sawmill and across the said slough and toward and near to the bank of said creek, and extending at a sharp angle with the current of said creek. Plaintiff further states that on or about the —— day of March, 1904, and while the timbers aforesaid were stacked upon said land, said Logan's creek overflowed its banks; that by reason of the negligence and carelessness of defendants in stacking said timbers across said slough the flow or current of water that ordinarily passes through said slough was obstructed and deflected toward and across the main body or channel of said creek with such force and velocity as to force the current or flow of water out of the main body or channel of said creek and across and upon the cultivated fields of plaintiff, situated upon the land aforesaid, thereby cutting and washing off the soil and otherwise damaging said field, so that the same has become and is wholly worthless to plaintiff. And plaintiff says that the reasonable value of said cultivated field before the said injury was $600." The answer admits that defendants are partners, but denies every other allegation in the petition. A verdict for plaintiff for $350, signed by ten of the jurors, was returned. Motions for new trial and in arrest of judgment were unavailing, and defendants appealed.

The court gave the following instructions for the plaintiff:

"(1) The court instructs the jury that if you shall believe and find from the evidence that the defendants, at the time alleged in plaintiff's petition, stacked a large quantity of large timbers across the slough mentioned in said petition, and that said slough is a watercourse as hereinafter defined, and that, by reason of the stacking of said timbers across said slough by said defendants, their agents, servants, or employees, the waters in said slough were diverted out of its usual channel and course of flowage, and caused to flow in the direction of and across the main channel of Logan's creek with such force and velocity as to turn the course of said Logan's creek upon and over plaintiff's land, thereby washing off the soil and otherwise injuring said land, you will find for the palintiff.

"(2) You are instructed that a 'water course' is defined to be 'a living stream with well-defined banks and channel, not necessarily running all the time, but fed from other and more permanent sources than surface water.' If, therefore, you shall find and believe that the slough in question had a well defined channel and banks through which, at certain seasons, the waters of Logan's creek were carried from a point on said creek above the land occupied by defendants, thence through defendant's land, and were again discharged into said creek from said slough, then said slough is a water course within the meaning of the above definition.

"(3) One of the defenses interposed by the defendants in this case is that the injury to plaintiff's land was caused by an extraordinary flood in Logan's creek, and was caused by what is known in law as the 'act of God.' You are therefore instructed that, although you shall find and believe from the evidence that such extraordinary flood was the cause of plaintiff's injury, you must find for the plaintiff, if you shall also believe that the negligence of defendants as charged in plaintiff's petition concurred with such flood and was one of the efficient causes of the injury to said land."

Defendants contend that these instructions took the case outside the pleadings. It is stated in the petition that Logan's creek is a natural water course, and that the slough is "a natural depression in the land, through which, upon the overflow of said creek, there is a strong flow or current of water coming from the overflow of said creek." As will be seen by the instructions given, the issue was submitted to the jury to find whether or not the slough was a natural water course. In Benson v. Railroad, 78 Mo. 504, the following definition of Dixon, C. J., in Hoyt v. City of Hudson, 27 Wis. 661, 9 Am. Rep. 473, is cited as the best definition of a "water course" to be found in the books. It is as follows: "There must be a stream usually flowing in a particular direction, though it need not flow continually. It must flow in a definite channel having a bed, sides, or banks, and usually discharge into some other stream or body of water. It must be something more than a mere surface drainage over the entire face of a tract of land, occasioned by unusual freshets or other extraordinary causes. It does not include the water flowing in the hollows or ravines in land, which is the mere surface water from rain or melting snow, and is discharged through them from a higher to a lower level, but which at other times are destitute of water. Such hollows or ravines are not in legal contemplation water courses." In Jones v. Railroad, 18 Mo. App. 251, an overflow of water from Indian creek, a natural water course, flowed into sloughs or swales, across one of which defendant built an embankment. In a suit for damming up the slough, the court held it was not a natural water course, and that defendant was not liable. In Johnson v. Railroad, 111 Mo. App. 378, 85 S. W. Rep. 941, overflow water from the Mississippi river passed over a protecting levee and followed a depression south of the city of Cape Girardeau, and extending southwest 12 or 14 miles into Big Lake, a natural water course. Defendant constructed its railroad across Big Lake, partly by embankment and partly by trestlework. Plaintiff's farm, two miles above the railroad, was partially overflowed by back water from Big Lake. The evidence tended to show that the overflow from the Mississippi river caused the water to back up from Big Lake and overflow plaintiff's lands. It was held that he could not recover for the reason the overflow from the river should be regarded as surface water. In McCormick v. Railroad, 57 Mo. 438, and Abbott v. Railroad, 83 Mo. 271, 53 Am. Rep. 581, it was held that water overflowing the banks of a stream and escaping upon bottom lands, in consequence of the insufficiency of the natural channel to contain and carry it off, is surface water.

The facts of the case in hand are different from any of the above cases. The slough, according to the evidence, connected with the channel of Logan's creek both at its head and mouth, and in times of ordinary or extraordinary freshets acted as an auxiliary channel to carry the waters of the creek from above to below the lands of plaintiff, and thus protected them from overflow. Therefore the slough, in a sense, was a part of the channel of the creek itself. It had a definite course, a definite channel. It was not supplied by surface water from the surrounding hills, but solely from the creek, and we think the evidence was sufficient to warrant the court in submitting to the jury the question of whether or not the slough was a natural water course. But this issue was not made by the pleadings, for it is not alleged in the petition that the slough is a natural water course, and the description given it by the pleader does not bring it within the legal definition of a natural water course. On the contrary, it is described as a swale or slough which receives overflow water from Logan's creek. The reckless diversion of overflow water, resulting in injury to some other person, furnishes at common law, and under the laws of this state, a cause of action to the one injured. Cox v. Railroad, 174 Mo. 588, 74 S. W. Rep. 854. But any obstruction of the flow of water in a natural water course, resulting in injury to another person, furnishes such person a right of action, however careful the obstruction may have been made. Edwards v. Railroad, 97 Mo. App. 103, 71 S. W. Rep. 366. The issue, as made by the pleadings, was whether or not the defendants had negligently diverted the overflow waters from the slough—not a natural water course—to the injury of plaintiff. The issue submitted to the jury was whether or not defendants had obstructed the flow of water in a slough, which the jury might find to be a natural water course, resulting in injury to the plaintiff. Thus it clearly appears that plaintiff sued on one cause of action, and, without amending his petition or offering to amend it to

conform to the proof, was permited to recover on a cause of action not stated in the petition. That a plaintiff cannot do this, notwithstanding the cause upon which he recovers would be a good cause of action, if well pleaded, is settled by numerous decisions of the appellate courts of this state. Chitty v. Railroad, 148 Mo. 64, 49 S. W. Rep. 868; Hoagland v. Amusement Co., 174 Mo. 335; Koenig v. Railroad, 173 Mo. 698, 73 S. W. Rep. 637; Allen v. St. Louis Transit Co., 183 Mo. 411, 91 S. W. Rep. 1142; Cafferty v. Choctaw Coal & Mining Co., 95 Mo. App. 174, 68 S. W. Rep. 1049.

The foregoing statement and opinion were prepared by the presiding judge of this court, but a majority of the court thought the point of variance between the evidence and the petition was not raised in a mode to justify reversing the judgment. Inasmuch as this must be done for an error in the third instruction, thereby making it necessary to retry the case, all question of the inconsistency of the evidence with the petition may be avoided at the next trial. The third instruction referred the jury to the petition for facts regarding defendants' alleged negligence, saying that, if the jury believed the negligence of defendant as charged in plaintiff's petition concurred with the flood as one of the efficient causes of the injury to the land, the verdict should be for the plaintiff, though the jury believed that an extraordinary flood was the cause of the damage. The instruction should have advised the jury what acts within the scope of the petition would constitute negligence on the part of the defendants, and that if they believed from the evidence defendants were guilty of such acts, and that these negligent acts co-operated with an extraordinary flood in producing the alleged damage, the verdict should be for the plaintiff, or words to that effect. It was error to refer the jury to the petition to ascertain what the negligence of defendants was. McGinnis v. Railroad, 21 Mo. App. 399; Procter v. Loomis, 35 Mo. App. 488.

The judgment is reversed, and the cause remanded. All concur.

NOTE.—*A Plaintiff can not Set up One Cause of Action in his Petition and Recover upon another Without Amending his Petition to Conform to the Proof.*—The case of Chitty v. Railroad, 148 Mo. 64, is cited to support this proposition, which is an old and well established principle of the law. In the Chitty Case, p. 75 we find the law stated tersely by Judge Marshall: "It is furthermore the law that where a plaintiff alleges specific acts of negligence on the defendant's part, his evidence and likewise his recovery will be limited to the specific acts charged, and this rule obtains even when a general averment of neligence precedes the averment of specific acts of negligence in the petition." A very interesting opinion by Judge Sherwood is found in the case of Waldhier v. The Hannibal & St. J. R. Co., 71 Mo. 517, in which a statutory provision is construed: "Our statutes (See R. S. 1899, Vol. 1, p. 263), it is true, provides that no variance between the allegation in the pleading and the proof shall be deemed material, unless it has actually misled the adverse party, to his prejudice, in maintaining his action or defense upon the merits. When it shall be alleged that a party has been so misled, the fact shall be proved to the satisfaction of the court by affidavit, showing in what respect he has been misled, and thereupon the court may order the pleading to be amended upon such terms as shall be just: and it has been ruled that an affidavit of having been misled was the only statutory test of such fact. Turner v. Railroad, 51 Mo. 501, and cases cited. But the statute has reference to mere discrepancies between the issue raised by the pleadings and the evidence offered in support of such issues and not to cases where the substance of the issue, so to speak, has no support in the testimony adduced. The correctness of this view finds ample confirmation in the subsequent provisions of the statute relating to new trials, where it is provided that, 'where the allegation of the cause of action or defense to which the proof is directed is unproved, not in some particular or particulars only, but in its entire scope and meaning it shall not be deemed a case of variance but a failure of proof.' (See R. S. 1899, p. 286) * * * The distinction made by the statute between the two classes of cases is so palpable as to render an extended discussion unnecessary. Following and adhering to the ruling in Buffington's Case, 64 Mo. 246, we must continue to hold that a recovery based upon a cause of action not stated cannot be permitted to stand. Our code with all its comprehensive liberality, will not admit a plaintiff to sue for a horse and recover a cow; no more will it admit evidence of a defect in a track of a railroad to the basis of such a recovery as the plaintiff seeks to have us sanction and affirm. We are willing to go the full length of the statute respecting variances but we are certainly unwilling to go to the extreme of saying that issues may be raised by the evidence and the instructions, as well as by the legitimate method, the pleadings." This is certainly so clear and comprehensive a statement of the law that there can be no misapprehension of where the court stood, and we most certainly believe it to be a correct statement of the law even though it is related in Thompson on Trials, sec. 2310, that the author subscribes to the view "that the jury should be instructed upon the case as made by the evidence, although variant from the issues made by the pleadings—* * * the object of the pleading being merely to notify the opposite party of the ground of the action or defense, if the party comes into court, it is not perceived why he may not waive the notice, as in every other case, although the pleading may not advise him of the case or defense which is actually tendered in the evidence. The sound view is believed to be that the instructions have no connection with the pleadings except through the evidence. The jury find from the evidence, not the pleadings. The pleadings are intended to apprise the opposite party of the ground of the action or defense and to guide the court in admitting or rejecting evidence. The jury have nothing to do with them; are not permitted to take them to their room when they retire, and it is unprofessional for counsel to comment on them to the jury, nor should the judge permit it to be done." It is to be observed that the cases cited to support this theory do not do so and the statement that this is "the sound view" must have been Mr. Thompson's own view, which is unsupported by every consideration of sound logic or wise procedure. It is true that the jury find from the evidence, but the *allegata* and *probata* must correspond. "Jurisdic-

tion depends upon descriptive allegations of a subject-matter," and this is shown to be one of the most important policies of sound procedure in the case of United States v. Cruikshank, 92 U. S. 542, and should be read with Windsor v. McVeigh, 93 U. S. 274. Where a most comprehensive view as well as exhaustive consideration of the importance of the pleadings is taken, it will be shown in so many ways that the heresy of the position above shown to have been taken by Mr. Thompson is unmistakably established. Yet this heresy has taken root in many of our states as a consequence of the unfortunate mistake of an author who had established a wide reputation through his work on trials. Most of the eastern and southern states' courts repudiate the attempts to extend this view in most emphatic terms.

JETSAM AND FLOTSAM.

THE UNDERWOOD TYPEWRITER COMPANY WINS ITS CELEBRATED PATENT RIGHT INFRINGEMENT SUIT AGAINST THE TYPEWRITER TRUST.

No class of mechanism has involved in a like period of time a greater amount of litigation than that of the typewriter. The history of the writing machine is, indeed, a history of suits and counter suits among the various concerns in their construction, and the complicated mechanical points involved have puzzled numbers of patent office experts, as well as judges and juries. By far the most important litigation of this class is that in which the Underwood Typewriter Company has just won a signal victory over the Remington Typewriter people and others, and the points involved are of such a character as to justify us going into the facts *in extenso*.

This litigation has centered upon the tabulating mechanism used on typewriters, and an outline of its history is as follows: The Underwood typewriter came on the market and had incorporated in the machine, and as a part of it, a device invented by a man by the name of Josiah B. Gathright, known as a "tabulating mechanism." Owing to the success of the Underwood machine, the Remington Typewriter Company, seeing the demand the Underwood was creating for such a device, placed upon their machine, as an attachment, what they called the "Gorin tabulator." Upon its appearance upon the market the Underwood Typewriter Company, known at that time as the Wagner Typewriter Company, started suit against Wyckoff, Seamans & Benedict, the selling agents of the Remington typewriter, claiming that the Gorin device was an infringement upon the Gathright patent owned by them. Soon after this, the American Writing Machine Company started a counter-suit against the Wagner Typewriter Company, now the Underwood Typewriter Co., claiming that the Gathright invention was an infringement on a patent owned by them and issued to one Schulte.

To fully understand this counter-suit it is necessary to explain that Wyckoff, Seamans & Benedict, the Remington Typewriter Company, the American Writing Machine Company, the Yost, Densmore and Monarch Typewriter Companies are all owned by one holding company, namely, the Union Typewriter Company. These two cases have been in the courts for a number of years, in fact, ever since 1898. At the first trial, before Judge Wheeler in the United States Circuit Court, a decision was rendered stating that neither party infringed the right of the other: that the Remington did not infringe the Gathright patent and that Wagner or Underwood did not infringe upon the Schulte patent. But an appeal was taken by the Underwood Company to the United States Circuit Court of Appeals from this decision, and the case was tried before Judges Lacombe, Townsend and Coxe, Circuit Judges, and a decision has just been rendered as follows: that the Gorin device is an infringement on the first Gathright patent, which means that the claims in the first Gathright patent are upheld and that the Remington in using the Gorin device infringes upon the rights of the Underwood Company; and the case is remanded to the Circuit Court, with instructions to enter a decree in conformity with this opinion.

The most interesting, and probably the most important part of the decision is that which relates to what is called the first Gathright patent. This was granted on September 23, 1890, and, as stated in the decision, which is written by Judge Coxe, it is pointed out that it relates to improvements in that class of machines which are provided with feed racks for moving a carriage to space between the letters of each line. Judge Coxe goes on to say: "The specification describes the improvement as embodied in a Remington machine. The patentee says that prior to his invention, when the operator desired to do tabulating work, it was necessary for him to advance the carriage by repeatedly striking a spacing key or by unlatching the carriage and sliding it to the desired point by means of a hand lever; both methods being tedious, irritating and perplexing. The patentee's object was to obviate these objections by providing means for automatically locating with the typewriter one or more columns of words or figures and mechanically skipping any intervening space desired to be left blank. The invention consists in the construction and combination of parts forming a portion of a typewriter designed to accomplish the objects stated."

The principal features of Gathright's invention are as follows:

"First, a supplemental spacing key which is exclusively devoted to the tabulating attachment and performs no function except in connection therewith. The operator, by pressing on this key disengages the detent, or feed dog, from the rack, which is held disengaged until the carriage passes over the desired space, when the carriage is stopped by the lateral arm of the feed bar, which is pivoted to the carriage, coming into contact with lugs adjustably but firmly fixed to the stop-rod. By releasing the key from pressure the stop-lug is removed from the usual path traveled by the carriage and the detent again engages with the toothed rack. An independent key of this character has advantages over the keys of the prior art and particularly over a key adapted by light pressure to advance the carriage a single letter space and, by heavier pressure, to release it entirely. Such a key, as is pointed out by the patentee, is in continual danger of being over-pressed. A second feature is the lift-slide and stop-rod freely hung, adjustable longitudinally of the machine, and normally supported close beneath some cross portion, like the lateral arm of the feed rack referred to above. This rod is raised and lowered by the spacing key lever and connecting upright post on which the rod is seated. This rod is provided with lugs for stopping the carriage which may be adjusted, by set screws, at any desired point on the rod. When the pressure on the key is released the rod returns to its normal position, the stopping shoulder of the lugs is removed out of the

path of the carriage and the machine is free to resume its step-by-step action. The lever between the key and the vertical post, which connects the lever to the stop-rod, is pivoted to the frame of the machine and constitutes the mechanism for lifting the lugs, into contact with the carriage arm and lowering them out of contact as the key is respectively pressed down or released. Generally speaking, the patentee's contribution to the art consists in providing an independent mechanism operated by a separate spacing key by which adjustable stop-lugs can be brought into contact with a portion of the feed carriage, thus dispensing with the use of the small and comparatively delicate feed dog or detent, to bear the greatly increased strain when the carriage is released from the istep-by-step movement. The drawings show the adjustable lugs attached to the stop-rod, but it is obvious that if, for any reason, it were desirable to transpose these parts so that the adjustable lugs are attached to the moving frame and the fixed abutment to the stop-rod, the change would not be a departure from the spirit of the invention. The two would be alternative and equivalent constructions. The tabulating attachment is so constructed that it may be attached to or removed from the machine without interfering with its use as an effective typewriter."

The patentee says: "It would require only ordinary mechanical skill to adapt my stop-rod and lugs to any kind of a self-feeding typewriter machine by following out the principle of construction herein described. Therefore, I deem it unnecessary to illustrate its application to the great variety of typewriting machines which have been invented."

The complainant, that is to say, the Underwood Company, contended that Gathright was the first to construct a commercially operative tabulator, that the patent was a pioneer and that these claims are entitled to a broad range of equivalents. The patentee's own views on this subject are stated in the specification as follows: "Because of the necessary changes in details of construction that would naturally result from the adaption of my invention to different styles of typewriting machines, I do not wish to confine my claims to the specific device herein described." The court points out that the defendant disputed this contention and insists that if a construction broad enough to include its tabulator is placed upon the cl ims, they are anticipated by prior patents and structure. If, however, the claims are confined to the improvements contributed by Gathright they are not infringed.

After discussing the features of the second patent, and the contention as to whether Gathright was a pioneer, the court goes on to say: "On the other hand, in construing the claims, consideration should be given to the character of the improvements introduced by Gathright and the changes in the art which is attributable to them. Though we are not prepared to say that the prior tabulators were abandoned failures we are fully convinced that the evidence establishes the proposition that they were not commercially successful and never could be made successful so long as the feed dog was utilized to receive the entire shock of the spring propelled carriage. Each of the prior machines had a doubtful and more or less checkered existence. After being battered and worn beyond the help of the repairer they finally disappeared as tabulators when the new type embodying the Gathright improvements began to make its appearance. In short, we are constrained to say that to Gathright belongs the credit of constructing the first commercially successful tabulator. The changes introduced by him seem simple and obvious in the light of the present, but it is a significant fact that all the prior inventors, Schulte, McCormack and Yost, used the feed dog to stop the carriage, and it never seems to have occurred to any one before Gathright to make the tabulating apparatus wholly independent of the writing machine proper. Gathright's device, though an improvement upon the existing tabulators, was an improvement of such vital importance that it may be said that the art when considered from a practical and commercial point of view began with him. He converted a theory into a fact. His invention belongs to that class, which has ever been treated with liberality by the courts, where the inventor by an apparently simple change, addition or transposition of parts, has converted imperfection into completeness."

The nature of the Gorin device, which the Underwood Company has always claimed was an infringement of the first Gathright patent—which contention is now upheld by the court—is described in the decision as follows: "The infringing device is known as the Gorin tabulator and is fully described in circulars issued by the defendant. It is a complicated structure containing many parts which it is not necessary to describe in detail. This device as shown in the Remington typewriter (No. 6), alleged to infringe, employs eight skipping keys, instead of one. These keys are arranged below the bank of printing keys and are mounted on push rods. When one of the keys is pressed inwardly it vibrates a vertical lever hung in the rear of the machine, the upper end of the lever having a pin connection with a sliding dog, or stop-lug, which is moved by the lever into the path of an adjustable stop on a bar attached to the carriage and moving with it. At the same time and by the same movement the plate which extends under the rack is raised so as to disengage the members of the feeding mechanism and permit the carriage to travel to the desired point for tabulating where it is stopped by the two abutting shoulders coming into contact. When pressure is removed from the key it is forced back by a spring motion and the ordinary step-by-step printing may be resumed. The question of infringement should be considered from the view point of a single spacing key; the addition of seven other spacing keys in no way affects the question. If one key and its connecting train of mechanism infringes it is sufficient. Speaking generally, it can hardly be denied that the defendant employs an independent tabulator which can be attached to or removed from an ordinary typewriter without affecting the normal operation of writing; or that the defendant uses an independent or supplemental spacing-key and, by means of a train of mechanism set in motion by this key, lifts the rack from connection with the feed dogs and stops to carriage at the desired point by bringing an abutting shoulder carried on the carriage frame against an abutting shoulder carried on a stop rod or lever, freely hung in the machine. That the defendant's spacing key is the substantial equivalent of the key of the patent is apparent and that the defendant's lever is the equivalent of the pivoted stop-rod 14 of the patent can hardly be disputed in view of the identity of function which evidently exists and which is frankly and clearly pointed out by the defendant's expert, Mr. Newberry. The defendant seeks to read into the claim adjustability as a feature of the stop-lug on the rod. Two answers at once suggest themselves. First, the claim

is silent on the subject; and, second, if the claim contained as its second element an adjustable stop-lug on the rod, infringement would not be avoided by placing the adjustable lug on the carriage. The location of the lug is not of the essence of the invention and it is manifestly immaterial and a mere matter of convenience whether the adjustable lug is on the rod or the carriage. Few patents would be safe if their claims could be avoided by a change of parts so obvious and unimportant. In the action of the Schulte patent the defendant was fully in accord with this view, for it was said by its expert: 'So long as one of these members of this stop mechanism is made adjustable, the carriage can be stopped at any desired point in its path of travel, and it is wholly immaterial, in my opinion, in view of the position that Schulte occupies in the typewriter art which one of these members is made adjustable.'"

It is presumed that application will be made by the Underwood Typewriter Company to the court for injunctions against all those infringing this device, and to what extent the matter of damages may now enter into the controversy we may not say; however, it is a plain fact that a large array of competing machines have for years used and profited by the property of the Underwood Typewriter Company, as finally decreed by the United States Circuit Court of Appeals.

BOOK REVIEWS.

THE AMERICAN STATE REPORTS.

We have before us volumes 107 to 110 of the American State Reports, in which we find many valuable notes upon subjects of importance and which frequently recur. We congratulate the publishers for the enterprise which has enabled them to bring out four volumes of the character of these, as shown by the carefully prepared notes, so soon after the great disaster which fell like a pall upon the land. San Francisco should be now named The Phœnix City. The Bancroft Whitney Company were among the heavy losers. This, however, does not seem to have discouraged them, but no doubt has roused them to renewed energy, and the writers of the notes have caught the spirit and brought forth some valuable contributions along the lines which we will set down as we take up each of the four volumes, giving some of the important features of each. The first note to a case to which we allude is found on page 99, Vol. 107, the principal case being Johnson v. Ætna Ins. Co. The title to the note being Of the Waiver of Stipulations and Conditions and Forfeitures in Insurance Policies. Under this heading we find treated: I. General rules applicable. II. What agents may waive and the limitations which may be imposed on their authority. III. Failure to cancel policy. IV. Failure to indorse waivers as expressly required by the policy. The subject-matter in this, as in all notes, is well treated and full of just the information which a lawyer desires. The next case, with exhaustive note, is that of the Acme Fertilizer Co. v. State, found on page 195 of the same volume. The title to the note is, What are Public Nuisances? The scope of the note states that, "In this note we shall consider only the substantive law on the question as to what constitutes a public nuisance. Hence, we shall not consider the question of remedies to abate or enjoin public nuisances nor criminal prosecutions for the maintenance of such nuisances." The substantive law is considered under 15 subheads plentifully supplied with authorities, as are all of these notes. The next leading case in this volume is that of Harkness v. Guthrie, on page 674, and relates to the Right of Stockholder to Inspect the Books of his Corporation and the Remedies for its Enforcement. This subject is considered under four heads. The fourth relates to the remedies. a. Demand and refusal. b. Recovery of damages. c. Mandamus proceedings. 1. In general. 2. Discretion of court. 3. Parties defendant. d. Equitable remedies. 1. In general. 2. Injunction and receivership. The next note in this volume is found in connection with the leading case of Brixen v. Jorgensen, on page 722 and is entitled "When a Vendor May Recover Possession from his Vendee," and is contained under five heads. A valuable feature of all these cases is the prominence given to the equitable remedies and defenses. The next subject treated of in this volume is that of Innkeepers' Liens, a subject of much importance and about which there is an ever increasing number of cases. This subject is treated under seven different subheads and in the manner of the other subjects mentioned, the leading case being Wertheimer-Swarts Co. v. Hotel, etc., Co. The first leading case in Vol. 108 is that of Stilwell v. Pæpcke-Leicht Lumber Co., on page 46, and relates to a subject about which there is great conflict of authority: Agreements Purporting to Liquidate Damages. The general tendency of business men is to provide for damages in their contract and while at first the courts were inclined to disfavor such stipulations of late there has been a tendency the other way. The subject is well treated and is a valuable contribution upon the subject and valuable to every lawyer. The next leading case in this volume is Carson v. City of Genesee, on page 136. The note is entitled: What Municipal Corporations are Answerabe for Injuries Due to Defects in Streets and Other Public Places. Articles upon this subject will find many to welcome them and this note is very full and valuable.

These suggestions as to the way the subjects are handled and the character of same is true of all four volumes and shows the value of them to the busy lawyer. In volume 109 we find on page 33, in a note to Stewart v. Wilson, the consideration of questions relating to Sheriff's Deeds; and on page 137, in a note to Coonan v. Lowenthal, entitled, Of the Setting off of One Judgment against Another, a carefully considered and valuable article is furnished. On page 563 of this volume is the note to Hawdy v. State, upon the subject of the Right of Counsel to Examine a Juror on his *Voir Dire* for the Purpose of Determining Whether to Exercise the Right of Peremptory Challenge. Volume 110 is like unto the others and of equal value.

Published by Bancroft-Whitney Company, San Francisco, Cal.

BOOKS RECEIVED.

A Treatise on the Law of Taxation by Special Assessments. By Charles H. Hamilton, of the Milwaukee Bar. Chicago. George I. Jones. 1907. Sheep. Price, $7.50. Review will follow.

A Treatise on the Law of Frauds, and the Statute of Frauds, also containing the English and the American Statutes of Frauds Annotated. By John W. Smith, LL.D., Author of "Municipal Corporations," "Receiverships," "Equitable Remedies of Creditors." Indianapolis. The Bobbs-Merrill Co., 1907. Buckram. Price $6.00. Review will follow.

HUMOR OF THE LAW.

The judge of the supreme court polished his glasses slowly and with the dignity becoming a member of so august a tribunal.

"Judge not," he said. "Judge not," and paused and sighed.

"Lest ye be roasted in the magazines," he added.—*Cleveland Press.*

WEEKLY DIGEST.

Weekly Digest of ALL the Current Opinions of ALL the State and Territorial Courts of Last Resort, and of all the Federal Courts.

1. ABATEMENT AND REVIVAL—Privilege from Service.—Privilege of a nonresident witness from service of summons in a civil case may not be pleaded in abatement.—Wilkins v. Brock, Vt., 64 Atl. Rep. 282.

2. ANIMALS—Running at Large.—It is within the police power of the state to prohibit the running of stock at large or their being herded within certain prescribed territory.—Reser v. Umatilla County, Oreg., 86 Pac. Rep. 595.

3. APPEAL AND ERROR—Harmless Error.—Misconduct of counsel in argument in calling attention to the fact that an affidavit for continuance of an absent witness, which was refused, was that of the opposing counsel, and not of the absent witness, held harmless.—Thomson v. Issaquah Shingle Co., Wash., 86 Pac. Rep. 588.

4. APPEAL AND ERROR—Objections Not Raised Below.—Accused held not entitled to object for the first time on appeal that the foreman of the grand jury failed to indorse his name on the indictment, and that the judge ordered a special venire instead of selecting the jury from the list chosen by the juror commissioners at the preceding term.—Beard v. State, Ark., 95 S. W. Rep. 995.

5. APPEAL AND ERROR—Waiver of Failure to Give Notice.—A stipulation filed on appeal by the attorney of record for a party and signed by him as attorney for such party, stipulating that the appeal had been perfected, waived any failure to serve notice of appeal on him.—Burnett v. Piercy, Cal., 86 Pac. Rep. 603.

6. ASSIGNMENTS FOR BENEFIT OF CREDITORS—Dividends on Claim.—On an assignment for the benefit of creditors, creditor to whom a debtor had agreed to transfer certain property and compromise claim held entitled to dividend only on a market value of such property.—*In re* Real Estate Inv. Co.'s Assigned Estate, Pa., 64 Atl. Rep. 331.

8. BANKRUPTCY—Amendment of Schedules.—Under Bankr. Act, 1898, ch. 541, § 2, an application by a bankrupt more than 18 months after his discharge to open the proceedings and amend his schedules by including an omitted creditor held unsustainable, though there were no assets belonging to the estate.—*In re* Spicer, U. S. D. C., W. D. N. Y., 145 Fed. Rep. 431.

9. BANKRUPTCY—Collusion.—Where an involuntary proceeding is filed, and the debtor has committed an act of bankruptcy, his consent or agreement to be adjudicated a bankrupt is not unlawful, and where the bankrupt alone has contested the petition cannot be attacked as collusive.—*In re* Billing, U. S. D. C., M. D. Ala., 145 Fed. Rep. 395.

10. BANKRUPTCY—Jurisdiction.—A court of bankruptcy held without original or ancillary jurisdiction to compel specific performance of an alleged contract with reference to a sale of a portion of the bankrupt's real estate between petitioner and the purchaser at a public sale held by the bankrupt's trustee.—Henrie v. Henderson, U. S. C. C. of App., Fourth Circuit, 145 Fed. Rep. 316.

11. BANKRUPTCY—Notice to Creditors.—Bankr. Act, 1898, ch. 541, not having provided for notice to creditors of the filing of a petition in involuntary bankruptcy, such notice is not necessary.—*In re* Billing, U. S. D. C., M. D. Ala., 145 Fed. Rep. 395.

12. BANKRUPTCY—Ownership of Property.—The jurisdiction of the bankruptcy court over all property of a bankrupt cannot be impaired by an unauthorized surrender of the property by the court's officers or through a seizure by an adverse claimant.—*In re* Schermerhorn, U. S. C. C. of App., Eighth Circuit, 145 Fed. Rep. 341.

13. BANKRUPTCY—Preferences.—The giving of a chattel mortgage to secure an antecedent debt is not a preferential transfer which constitutes an act of bankruptcy where it is given in good faith in renewal of a prior mortgage and covering the same property; nor does the including of additional property render it preferential where the mortgagor receives a further present consideration sufficient to warrant the additional security.—*In re* Cutting, U. S. D. C., W. D. N. Y., 145 Fed. Rep. 388.

14. BANKRUPTCY—Redelivery of Shipping Receipts to Seller.—Redelivery of shipping receipts for grain by the buyer, after bankruptcy had intervened, to the seller, held not to reinvest the seller with title to the grain, which had already vested by operation of law in the buyer's trustee in bankruptcy.—Grange Co. v. Farmers' Union & Milling Co., Cal., 86 Pac. Rep. 615.

15. BANKS AND BANKING—Penalties.—A national bank held liable for violation of the banking act only to the United States government.—Farmers' Deposit Nat. Bank v. Western Pennsylvania Fuel Co., Pa., 64 Atl. Rep. 374.

16. BENEFIT SOCIETIES—Authority of Subordinate Lodge.—Where the subordinate lodge of a mutual benefit society voted to relieve a member by loaning him the amount of four assessments, the vote amounted to an appropriation of the lodge's funds to the payment of such assessments.—Johanson v. Grand Lodge A. O. U. W., Utah, 86 Pac. Rep. 494.

17. BOUNDARIES—Description.—To reconcile the calls of a survey or to harmonize the quantity of land with that called for the calls may be reversed and the lines run in the opposite direction.—Newbold v. Condon, Md., 64 Atl. Rep. 356.

18. BROKERS—Revocation of Power to Sell.—A broker's exclusive authority to sell land for a specified time held revocable by a notice given within the time.—Norton v. Sjolseth, Wash., 86 Pac. Rep. 573.

19. CARRIERS—Acceptance of Rebate.—The fact that a shipper who contracts for and receives a rebate in violation of the statute personally receives no benefit therefrom, but turns the same over without consideration to another, does not relieve him from criminal liability.—United States v. Wood, U. S. D. C., E. D. Pa., 145 Fed. Rep. 405.

20. CARRIERS—Termination of Relation of Passenger.—The court cannot say as a matter of law that the relation

of carrier and passenger ceases after the expiration of four minutes after the arrival of the train at the point of destination.—Hodges v. Southern Pac. Co., Cal., 86 Pac. Rep. 620.

21. COMMERCE—Hawkers and Peddlers.—Laws 1903, p. 27, ch. 16, forbidding the sale by an itinerant vendor of any except certain classes of articles without first obtaining a license, held not in violation of the interstate commerce clause of the federal constitution.—Territory v. Russell, N. M., 86 Pac. Rep. 551.

22. CONSPIRACY—What Constitutes.—"Conspiracy" is a combination of two or more persons by concerted action to accomplish a criminal or unlawful purpose, or to accomplish a purpose not criminal by criminal and unlawful means.—State v. Messner, Wash., 86 Pac. Rep. 636.

23. CONSTITUTIONAL LAW — Discrimination Against Patented Articles.—Sand. & H. Dig. Ark. §§ 493, 496, making void negotiable notes given for any patented machine or thing unless executed on a printed form stating such fact, is unconstitutional and void.—Ozan Lumber Co. v. Union County Nat. Bank, U. S. C. C. of App., Eighth Circuit, 145 Fed. Rep. 344.

24. CONSTITUTIONAL LAW — Impairing Obligation of Contracts.—An enlargement of the remedies of creditors of a corporation, either against the corporation itself or its shareholders, impairs the obligation of no contract. —Converse v. Ætna Nat. Bank, Conn., 64 Atl. Rep. 341.

25. CONSTITUTIONAL LAW—Intoxicating Liquors.—The penalty under Laws 1903, p. 524, ch. 338, for violation of injunctions in liquor cases, is a part of the prohibitory liquor law, and in fixing such penalty the legislature did not infringe upon the inherent power of the courts to punish for contempt.—State v. Thomas, Kan., 86 Pac. Rep. 499.

26. CONTRACTS—Making Performance Impossible.—Where one voluntarily puts it out of his power to do what he agreed to do in the way agreed upon, he commits a breach of contract and becomes liable generally.—Teachenor v. Tibbals, Utah, 86 Pac. Rep. 488.

27. CONTRACTS—Sale of Articles Made by Secret Process.—The fact that an article sold is produced by a secret process does not affect the question whether the provisions of the contract render it illegal as in restraint of trade.—Hartman v. John D. Park & Sons Co., U. S. C. C., E. D. Ky., 145 Fed. Rep. 358.

28. COSTS—On Appeal.—Where on appeal the judgment was affirmed except as to a modification consisting of a substantial reduction in the amount thereof, appellant was entitled to recover the costs on the appeal.—J. W. Wheeler Co. v. Pates, Wash., 86 Pac. Rep. 625.

29. CORPORATIONS—Constitutional Law.—A contract between a corporation and a state by the grant of a charter and its acceptance is subject to alteration under the power reserved in the constitution.—State v. Chicago & N. W. Ry. Co., Wis., 108 N. W. Rep. 594.

30. CORPORATIONS—Contracts. — One who contracts with a corporation, as such, or those in privity with him, cannot avoid the effect of such contract on the ground of a defect in the organization of the corporation. — Rannels v. Rowe, U. S. C. C. of App., Eighth Circuit, 145 Fed. Rep. 296.

31. CORPORATIONS—Fraudulent Acts of Officer.—Where an officer of a corporation does an official act constituting a fraud on a third person, such corporation held chargeable with notice of the transaction.—First Nat. Bank v. Stribling, Okla., 86 Pac. Rep. 512.

32. CORPORATIONS—Liability of Stockholders.—By purchasing stock in a corporation the stockholder incurs a liability to perform such contractual obligations as are attached by the laws of the corporation's domicile to the ownership of its capital stock.—Converse v. Ætna Nat. Bank, Conn., 64 Atl. Rep. 341.

33. CORPORATIONS—Stock Subscription.—A stock subscription is not invalid because of a bonus of stock paid by a person to whom it had been issued in payment of a patent right assigned to the corporation.—Marles Carved Moulding Co. v. Stulb, Pa., 64 Atl. Rep. 431.

34. CORPORATIONS—Winding Up Affairs.—Act May 21, 1881 (P. L. 30), authorizing trading corporations to wind up their affairs, applies to corporations whose property and franchises had been sold on execution.—Pocono Spring Water Ice Co. v. American Ice Co., Pa., 64 Atl. Rep. 398.

35. COUNTIES—Authority to Issue Bonds. — A county has no authority to issue bonds to pay county warrants, where the bonds, in addition to the debt of the county at the time, raise the county debt above the constitutional limit.—State v. Ross, Wash., 86 Pac. Rep 575.

36. COURTS—Jurisdictional Amount.—Where jurisdiction of the circuit court has once attached, it will not be devested because plaintiff only recovers a sum less than $50, notwithstanding Rev. St. 1899, §§ 1674, 3886.—Barnes v. Metropolitan St. Ry. Co., Mo., 95 S. W. Rep. 971.

37. COURTS—Restraining Proceedings in Other State.—The courts of Washington held to possess jurisdiction to prevent a citizen thereof from prosecuting a suit instituted in the courts of another state against a citizen of Washington.—Rader v. Stubblefield, Wash., 86 Pac. Rep. 560.

38. CRIMINAL EVIDENCE—Flight.—That accused was in jail when arrested as fugitive held competent.—Campos v. State, Tex., 95 S. W. Rep. 1042.

39. CRIMINAL EVIDENCE—Scope of Testimony in Rebuttal.—Where accused sought to create an inference that he was being prosecuted by bankers while he was a poor man, it was proper for the state to show that deceased was a patron of a bank other than that controlled by the state's witnesses.—Newcomb v. State, Tex., 95 S. W. Rep. 1048.

40. CRIMINAL LAW—Confession of Codefendant.—Confession by one indicted for aiding another in an embezzlement held sufficient to justify the submission to the jury of the issue of the other's guilt as forming a basis for defendant's guilt in aiding in the crime.—Burk v. State, Tex., 95 S. W. Rep. 1064.

41. CRIMINAL TRIAL—Argument of Counsel.—Counsel for the state held entitled to argue that the evidence justified a conviction, to ask the jury to convict, to state that he personally had no interest in the matter, and that the jury should not turn a bloody and cruel murderer free.—Newcomb v. State, Tex., 95 S. W. Rep. 1048.

42. CRIMINAL TRIAL—Confession. — The *corpus delicti* cannot be established by proof of a confession, but where the *corpus delicti* has been proved, the confession may be used to connect the accused with the crime.—*Ex parte* Patterson, Tex., 95 S. W. Rep. 1061.

43. CRIMINAL TRIAL—Harmless Error.—Where a motion for new trial charges misconduct of the jury in permitting the bailiff to be present during its deliberation, and it clearly shows that he took no part in such deliberations, and that his presence did not influence jury, the wrongful presence was immaterial error.—Graves v. Territory, Okla., 86 Pac. Rep. 521.

44. CRIMINAL TRIAL—Reception of Evidence.—The action of the trial court in admitting evidence after the commencement of argument will not be disturbed on appeal unless an abuse of discretion resulting in injury to defendant appears.—Jones v. State, Tex., 95 S. W. Rep. 1044

45. CRIMINAL TRIAL — Verdict. — Separate verdicts against two defendants jointly informed against and tried together for grand larceny held not void for uncertainty as to title.—State v. Cotterel, Idaho, 86 Pac. Rep. 527.

46. DAMAGES—Exemplary Damages.—In an action for personal injuries the jury should be instructed that the damages which they award under the name of exemplary damages must be limited in amount to the amount of plaintiff's expenses less the taxable costs in the suit.—Hull v. Douglass, Conn., 64 Atl. Rep. 351.

47. DAMAGES—Pleading.—One suing for personal injuries must, in his petition, set forth specifically the nature

and character of the injuries, so that the alleged wrongdoer may know how to prepare a defense.—City of Dallas v. McCullough, Tex., 95 S. W. Rep. 1121.

48. DEATH—Damages for Loss of Services.—In an action for the death of plaintiff's wife, held proper to permit the husband to testify that he considered his wife's services in the care of his household, etc., as worth a certain sum.—Chicago, R. I. & G. Ry. Co. v. Groner, Tex., 95 S. W. Rep. 1118.

49. DEEDS—Condition Subsequent.—An assignee of a grantee in a deed containing a condition subsequent held entitled to remove improvements within a year after entry by the grantor.—Norris v. Coffman, Tex., 95 S. W. Rep. 1088.

50. DEEDS—Construction as to Conditions.—Whether a condition in a deed is precedent or subsequent is always a question of the intention of the parties which is to be gathered from the context of the instrument read in those lights which are properly employed in the construction of writings.—Rannels v. Rowe, U. S. C. C. of App., Eighth Circuit, 145 Fed. Rep. 296.

51. DESCENT AND DISTRIBUTION—Will Omitting Grandchild.—Where testator remembered his daughter in his will, but not her child, whom testator had adopted, it could not be presumed that he had forgotten such child, so as to entitle him to an heir's share in testator's estate, under Rev. St. 1899, § 4611.—Fugate v. Allen, Mo., 95 S. W. Rep. 980.

52 DIVORCE—Alimony.—The court granting a divorce and decreeing alimony, under Ballinger's Ann. Codes & St., § 5723, held to have had authority to discontinue the alimony.—Mahncke v. Mahncke, Wash., 86 Pac. Rep. 645.

53. DIVORCE—Division of Property.—Under Ballinger's Ann. Codes & St., § 5723 (Pierce's Code, § 4637), where a divorce is granted, all of the property of the parties is subject to the disposition of the court.—Budlong v. Budlong, Wash., 86 Pac. Rep. 648.

54. DIVORCE—Suit Money and Counsel Fees.—Where it appears that the defendant has means with which to pay, and his wife is without means to properly prosecute her suit for divorce, the court will allow her suit money and counsel fees.—Day v. Day, Idaho, 86 Pac. Rep. 531.

55. ELECTIONS—Contest.—The constitution requiring the general assembly to provide for contesting elections in cases not specially provided for held inapplicable to elections for nominations.—Hester v. Bourland, Ark., 95 S. W. Rep. 992.

56. EMBEZZLEMENT—Question for Jury.—On a prosecution for embezzlement, held a question for the jury whether defendant had converted to his own use money belonging to prosecuting witness.—State v. Buchanan, Wash., 86 Pac. Rep. 650.

57. EMINENT DOMAIN—Damages.—Damages cannot be recovered for personal inconvenience resulting naturally and without negligence from the operation of cars and engines.—Oklahoma City & T. R. Co. v. Scarborough, Tex., 95 S. W. Rep. 1089.

58. EMINENT DOMAIN—Railroad's Illegal Use of Street.—Equity will not restrain illegal use of a street by railroad, but will give it reasonable time to abate the nuisance or come to some agreement with complainant.—Hall v. Pennsylvania R. Co., Pa., 64 Atl. Rep. 408.

59. ESTOPPEL—By Deed.—A delivered deed is conclusive as to the intent of the grantor to convey the property described.—Mascarel v. Mascarel's Exrs., Cal., 86 Pac. Rep. 617.

60. ESTOPPEL—Covenants.—Wife joining in general warranty with husband for purpose of conveying dower held bound by the covenant thereof.—George v. Brandon, Pa., 64 Atl. Rep. 371.

61. EVIDENCE—Declarations of Wife.—Declarations of a wife made during her husband's life impeaching his title held not admissible against her claim to title based on his having had title.—Hoyt v. Zumwalt, Cal., 86 Pac. Rep. 600.

62 EVIDENCE—Judicial Notice as to Federal Department Regulations.—A federal appellate court should not be asked to take judicial notice of department regulations, but where relied on they should be read and put into the record in the trial court.—Nagle v. United States, U. S. C. C. of App., Second Circuit, 145 Fed. Rep. 302.

63. EVIDENCE—Negligence.—In an action for injuries to one injured by the fall of packages of lumber through an elevator shaft, held proper to admit testimony as to the manner in which packages were tied just previous to the one which fell.—Smith v. Dow, Wash., 86 Pac. Rep. 555.

64. EVIDENCE—Sufficiency.—There must be some direct evidence of fact or circumstances from which a jury would be warranted in saying that the inferences therefrom clearly preponderate in favor of the existence of the fact in order to take the case to the jury.—Kern v. Snider, U. S. C. C. of App., Seventh Circuit, 145 Fed. Rep. 327.

65. EXECUTORS AND ADMINISTRATORS—Ancillary Administration.—The courts of a state other than the state of the domicile of a testator may, after the payment of debts and costs, distribute the personal estate within their jurisdiction according to the laws of the state of the domicile of the testator.—Rader v. Stubblefield, Wash., 86 Pac. Rep. 560.

66. FRAUDS, STATUTE OF—Part Performance.—Acts of a buyer of real estate in improving property after taking peaceable possession held sufficient part performance to take the contract out of the statute of frauds.—Peterson v. Hicks, Wash., 86 Pac. Rep. 634.

67. FRAUDULENT CONVEYANCES—Action by Creditor.—In action by a judgment creditor to set aside a conveyance by his debtor as fraudulent, a judgment setting aside the conveyance absolutely held erroneous.—Delia v. Caprio, Conn., 64 Atl. Rep. 340.

68. GIFTS—Bank Deposit.—A voluntary delivery by a depositor of his bank book to a donee, with the intention of making an absolute gift, constituted a valid gift of the deposit represented by such book.—Meriden Sav. Bank v. McCormack, Conn., 64 Atl. Rep. 338.

69. GIFTS—Donatio Causa Mortis.—The doctrine of *donatio causa mortis* applies only to personal property as provided by Civ. Code, §§ 1146, 1149, *et seq.*—Mascarel v. Mascarel's Ex'rs., Cal., 86 Pac. Rep. 617.

70. GUARANTY—Construction.—Defendant held not liable on a contract guarantying the collection of certain assets of a corporation beyond the amount of the indebtedness thereof.—Miller v. Sloan, Ark., 95 S. W. Rep. 994.

71. HABEAS CORPUS—Extradition.—It will be presumed in favor of the validity of a governor's requisition warrant that his requisition was attached to the papers on which it was issued, and that he stated that such papers were authenticated according to the laws of the demanding state.—*Ex parte* Cheatham, Tex., 95 S. W. Rep. 1077.

72. HAWKERS AND PEDDLERS—Licenses.—Laws 1903, p. 27, ch. 16, requiring licensing of peddlers on sale of all articles except "domestic machinery," etc., the phrase "domestic machinery" does not include a buggy or wagon for use at the purchaser's house.—Territory v. Russell, N. M., 86 Pac. Rep. 551.

73. HOMICIDE—Intent.—A conviction is authorized on a prosecution for assault with intent to murder, though it appears that defendant shot at prosecutor for the purpose of robbery.—Jones v. State, Tex., 95 S. W. Rep. 1044.

74. HUSBAND AND WIFE—Separate Estate of Wife.—Act June 8, 1893, (P. L. 344), held not to prohibit a married woman from invoking assistance of court of equity to protect her separate estate from the fraud of her husband.—Heckman v. Heckman, Pa., 64 Atl. Rep. 425.

75. INJUNCTION—Adequate Remedy at Law.—Plaintiff having suffered no appreciable damages by defendant's diversion of water from a stream, and having an adequate remedy at law for any damages suffered, held not

entitled to an injunction restraining such diversion.—Mann v. Parker, Oreg., 86 Pac. Rep. 598.

76. INTOXICATING LIQUORS—Violation of Injunction.—On trial of an accusation by a citizen as prosecutor charging the person with the violation of an injunction under liquor law, the state need not show that the prosecutor had personal knowledg of such violation, nor prove that the injunction was granted.—State v. Thomas, Kan., 86 Pac. Rep. 499.

77. JUDGES—Authority of Special Judge.—It is not contemplated that both the regular and special judges should hold court at the same time in the same county.—Bedford v. Stone, Tex., 95 S. W. Rep. 1086.

78. JUDGMENT—Vacation after Term.—The superior courts possess power to vacate void judgments, decrees, and orders, even after the close of the term at which they are given.—Huffman v. Huffman, Oreg., 86 Pac. Rep. 593.

79. JURY—Empaneling.—Overruling objections of defendant to empaneling the jury in the absence of part of the jurors named in the original special venire held not error.—Hughes v. State, Tex., 95 S. W. Rep. 1034.

80. JUSTICES OF THE PEACE—Compensation.—A justice held not entitled to recover fees from the county, though a statute under which he had received a salary in lieu of fees was unconstitutional.—State v. Messerly, Mo., 95 S. W. Rep. 913.

81. MANDAMUS—City Controller.—*Mandamus* held not to lie to compel controller of a city of the third class to certify contract for furnishing electric lights, where no appropriation had been made.—Commonwealth v. Foster, Pa., 64 Atl. Rep. 367.

82. LANDLORD AND TENANT—Action For Rent.—In an action by a bank to recover rent for an office tenant, that the bank under its charter cannot erect an office building and rent out offices, cannot be set out as a defense.—Farmer's Deposit Nat. Bank v. Western Pennsylvania Fuel Co., Pa., 64 Atl. Rep. 374.

83. LANDLORD AND TENANT—Appurtenances.—A lessor held not to have had under the terms of the lease a right to occupy a certain hallway in the building.—Lindblom v. Berkman, Wash., 86 Pac. Rep. 567.

84. LIBEL AND SLANDER—Privileged Communications.—The presumption of malice and actionable damages arising from the publication of words libelous *per se* held met by proof that the publication was privileged.—Chambers v. Leiser, Wash., 86 Pac. Rep. 627.

85. LOST INSTRUMENTS — Indemnity. — A defendant against whom judgment was rendered on a renewal note not executed by her held amply protected against liability on the original note (Code Pub. Gen. Laws, art. 13, § 11).—Councilman v. Towson Nat. Bank, Md., 64 Atl. Rep. 358.

86. MANDAMUS—Judicial Proceedings.—*Mandamus* will not lie to compel a trial court to order a stay or fix a bond to supersede a prohibitory injunction pending appeal.—State v. Superior Court of Chehalis County, Wash., 86 Pac. Rep. 632.

87. MASTER AND SERVANT—Duty to Furnish Safe Appliances.—It is the duty of the master to furnish a reasonably safe place and appliances, but he is not required to furnish any certain make of machinery.—Imhoof v. Northwestern Lumber Co., Wash., 86 Pac. Rep. 650.

88. MASTER AND SERVANT—Negligence of Fellow Servants.—Where a master furnished a pile of planks for use in the construction of a scaffold, the act of a servant in selecting a defective plank which broke and injured a fellow servant was not the act of the master.—Forbes v. Dunnavant, Mo., 95 S. W. Rep. 984.

89. MASTER AND SERVANT—Reliance on Care of Master.—Where the master selected and adjusted the wedge, by the fall of which an employee was injured, and assured him of its safety, held he had a right to rely on its safety.—Sullivan v. R. D. Wood & Co., Wash., 86 Pac. Rep. 629.

90. MECHANICS' LIENS—Waiver.—The waiver of mechanics' liens to allow the owner to obtain a loan held to include claims for labor and material furnished between the date of the waiver and the time the mortgage became a lien on the property.—Weinberg v. Valente, Conn., 64 Atl. Rep. 337.

91. MORTGAGES—Redemption.—Where there has been no change in conditions which places the lender in a worse position, and his loss may be compensated by payment of interest, forfeiture for delay will not be allowed.—*In re* King's Estate, Pa., 64 Atl. Rep. 324.

92. MUNICIPAL CORPORATIONS — Action on County Treasurer's Bond.—City cannot sue in name of commonwealth on bond of county treasurer to the commonwealth, to recover commissions on liquor license fees, the property of the city.—Commonwealth v. Scranton, Pa., 64 Atl. Rep. 321.

93. MUNICIPAL CORPORATIONS—Defective Sidewalks.—In an action for injuries by reason of a defective sidewalk, mere knowledge of plaintiff that a paving block was loose, without knowledge that there was a hole under it, held not fatal to recovery.—Cassidy v. Kansas City, Mo., 95 S. W. Rep. 948.

94. MUNICIPAL CORPORATIONS—Furnishing Water to Parties Outside of Borough.—While a borough has the power to construct a reservoir and to conduct water to its inhabitants, it cannot furnish water to parties outside the borough limits.—Stauffer v. East Stroudsburg Borough, Pa., 64 Atl. Rep. 411.

95. MUNICIPAL CORPORATIONS—Obstruction of Highway.—Where a person is injured by the obstruction of a highway by mortar boxes, the borough is liable where it had allowed them to remain for three or four weeks.—Munley v. Sugar Notch Borough, Pa., 64 Atl. Rep. 377.

96. MUNICIPAL CORPORATIONS—Torts.—Operating an electric light system by a municipality held a proprietary and private right and power for the careless and negligent exercise of which the muncipality will be held liable in damages.—Eaton v. City of Weiser, Idaho, 86 Pac. Rep. 541.

97. NEW TRIAL—Harmless Error —A verdict against a party not entitled to recover on any theory of the case should not be set aside because of erroneous instructions.—Lomax v. South West Missouri Electric R. Co., Mo., 95 S. W. Rep. 945.

98. NEW TRIAL — Sufficiency of Evidence. — Where there was direct and positive evidence in support of a verdict, the court is not authorized on a motion for a new trial to consider the question of the number or credibility of the witnesses.—Burch v. Southern Pac. Co., U. S. C. C., D. Nev., 145 Fed. Rep. 443.

99. NOTICE—Notice of Address.—The sending of a letter directing the addressee to do something held not the notification of the sender's address agreed on.—Ward v. Morr Transfer & Storage Co., Mo., 95 S. W. Rep. 964.

100. NUISANCE—Right to Injunction. — One held not entitled to have the operation of the power plant of a sawmill which he built and sold enjoined, though soot and ashes therefrom are a private nuisance to his residence.—Woodard v. West Side Mill Co., Wash., 86 Pac. Rep. 579.

101. PARTIES—Disability of Plaintiff to Sue.—A motion to quash proceeding taken by a claimant in attachment proceedings, on the ground that she was the wife of the judgment defendant, was properly denied, as the disability of a plaintiff to sue must be set up by plea in abatement.—Albert v. Freas, Md., 64 Atl. Rep. 282.

102. PARTITION—Who may Maintain.—One who owns in fee simple an undivided half interest in real estate can sue to compel partition as against his co-tenants, having a life interest in the other undivided half.—Johnson v. Brown, Kan., 86 Pac. Rep. 503.

103. PARTNERSHIP—Surviving Partners.—A surviving partner and his wife and the wife of the deceased partner held not capable of creating a lien on the partnership estate as against the partnership administrator, so as to preclude him from receiving the excess of purchase money after a sale by the trustee under a deed of trust

executed by the partners.—Barnes v. Stone, Mo., 95 S. W. Rep. 915.

104. PERJURY—Sufficiency of Indictment.—In a prosecution for perjury, consisting of defendant's evidence that M and others did not play cards at a certain time in question, it was proper for the state to prove by M and others that they did play cards on that occasion.—Stanley v. State, Tex., 95 S. W. Rep. 1076.

105. PLEADING—Complaint.—A defendant held not entitled to complain of an amendment of the complaint where he made no motion for a continuance on the ground of surprise.—Smith v. Michigan Lumber Co., Wash., 86 Pac. Rep. 652.

106. PLEADING—Misjoinder of Causes.—The objection that two causes of action are improperly united in one suit is waived on defendant failing to demur to the petition or in any manner raise the question of misjoinder.—Barnes v. Metropolitan St. Ry. Co., Mo., 95 S. W. Rep. 971.

107. POST OFFICE—Action on Postmaster's Bond.—In an action on a postmaster's bond to recover money alleged to have been illegally paid out by him, evidence of what took place in the office after it was turned over to his successor was inadmissible against him.—Nagle v. United States, U. S. C. C. of App., Second Circuit, 145 Fed. Rep. 302.

108. POWERS—Sale of Land by Agent.—Ratification by trustees under a will empowering them to sell and convey land, of a sale made by an agent, held equivalent to a sale by the trustees themselves.—Hill v. Peoples, Ark., 95 S. W. Rep. 990.

109. PRINCIPAL AND AGENT—Agency of Husband.—A wife, having ratified her husband's contract to purchase certain lands, held also bound by his agreement to execute a bond for a deed of the lands to another for whom the purchase was made.—Peterson v. Hicks, Wash., 86 Pac. Rep. 634.

110. PRINCIPAL AND AGENT—Liability for Misrepresentations of Agent.—Where an agent employed to sell lands effects a sale by means of false representations in respect to the land, the principal is chargeable with the fraud, even though he had no personal knowledge of it.—Millard v. Smith, Mo., 95 S. W. Rep. 940.

111. PRINCIPAL AND SURETY—Liability of Surety.—Defendant having signed a bond to secure the performance of a contract between plaintiffs and H, held not liable on a debt incurred by H outside of the contract.—Dr. Koch Vegetable Tea Co. v. Gates, Wash., 86 Pac. Rep. 624.

112. PROHIBITION—Judicial Proceedings.—Prohibition held not to lie to restrain the suspension of a prohibitory injunction pending appeal, as violating Const. art. 1, § 16.—State v. Superior Court of Chehalis County, Wash., 86 Pac. Rep. 632.

113. RAILROADS—Sidings.—An adjoining landowner held to have a statutory right to connect with a railroad by a siding, of which he could not be deprived by contract of the railroad with a third party.—Reeser v. Philadelphia & R. Ry. Co., Pa., 64 Atl. Rep. 376.

114. SALES—Delivery.—Where defendant sold to plaintiff certain cattle of a particular brand, the delivery of horses in lieu of undelivered cattle did not reinvest the seller with title and ownership of the undelivered cattle thus branded.—Barber v. Harper, N. M., 86 Pac. Rep. 546.

115. SALES—Breach of Warranty.—The purchaser of a horse cannot recover actual damages for breach of warranty and also statutory damages under Ballinger's Ann. Codes & St., § 7176.—Galbraith v. Carmode, Wash., 86 Pac. Rep. 624.

116. SALES—Estoppel as to Warranty.—A city's failure to subject fire hose to a test on delivery held not a waiver of a warranty that the hose would stand a certain pressure test when delivered.—Gutta Percha & Rubber Mfg. Co. v. City of Cleburne, Tex., 95 S. W. Rep. 1131.

117. SALES—Implied Warranty.—A contract for the sale of corn held an executory one, containing an implied warranty that the corn would be sound and merchantable on delivery.—Atkins Bros. Co. v. Landa, Mo., 95 S. W. Rep. 949.

118. SALES—Passing of Title.—Defendant, to whom certain grain purchased by C. & Co. was consigned according to the latter's order, held not a mere forwarding agent for C. & Co., and hence there could be no stoppage *in transitu* after delivery to defendant, under Civ. Code, §§ 3078, 3080.—Grange Co. v. Farmers' Union & Milling Co., Cal., 86 Pac. Rep. 615.

119. SCHOOLS AND SCHOOL DISTRICTS—Excluding Unvaccinated Children.—Act June 18, 1895 (P. L. 208), requiring exclusion from public schools of children who have not been vaccinated, is a valid exercise of the police power.—Stull v. Reber, Pa., 64 Atl. Rep. 419.

120. SET-OFF AND COUNTERCLAIM—When Allowed—A landlord sued his tenant for breach of covenant to assume an unperformed contract. Held that damages for breach of covenant for quiet enjoyment cannot be set off where there had been no eviction at the time the action was brought.—Pocono Spring Water Ice Co. v. American Ice Co., Pa., 64 Atl. Rep. 398.

121. SPECIFIC PERFORMANCE — Trusts. — Defendant having acquired title to certain property under an oral contract to execute a bond for a deed to plaintiffs, held constructive trustees of the title authorizing plaintiffs to maintain suit for specific performance.—Peterson v. Hicks, Wash., 86 Pac. Rep. 634.

122. STATUTES—Legislative Meaning.—Where the literal sense of a statute if adopted as the legislative meaning would shock the ordinary sense of justice, it is to be rejected if some other meaning which if reasonable can be readily read therefrom by the aid of any rule for judicial construction which can reasonably be seen to be the real intent of the legislature.—State v. Chicago & N. W. Ry. Co., Wis., 108 N. W. Rep. 594.

123. STATUTES—Rules of Construction.—General terms and expressions of a statute are to be given general construction unless some other provision shows that the legislature intended them to be applied in a restricted sense.—Skeen v. Craig, Utah, 86 Pac. Rep. 487.

124. STREET RAILROADS—Injury to Passenger on Front Platform.—A passenger in a street car riding on the front platform and injured cannot recover for injuries received if there was room for him to ride inside.—Mc Dade v. Philadelphia Rapid Transit Co., Pa., 64 Atl. Rep. 327.

125. TAXATION—Real Estate Held by Bank.—Real estate owned by a national bank must be assessed against the bank, but not at a higher percentage than other real estate of the same character.—First Nat. Bank v. Albright, N. M., 86 Pac. Rep. 540.

126. TAXATION—Tax Title.—A holder of an invalid tax title, who pays the taxes on the land subsequent to the acquisition of the title and before it has been adjudged void, is entitled to recover from the owner of the land the taxes paid, together with a lien on the land therefor.—J. W. Wheeler Co. v. Pates, Wash., 86 Pac. Rep 625.

127. USURY—Construction of Agreement.—An agreement, though involving an alleged device to evade the usury law as by way of a sale or resale, which is entered into in good faith, and with no purpose to evade such law, may be upheld.—Gould v. St. Anthony Falls Bank, Minn., 108 N. W. Rep. 951.

128. VENDOR AND PURCHASER—Forfeiture of Payments Made.—Where time is of the essence of a contract for the sale of land, a provision that on forfeiture by the vendee the vendor may retain payments made, held binding.—Palmer v. Washington Securities Investment Co., Wash., 86 Pac. Rep. 640.

129. VENDOR AND PURCHASER—Contract to Convey Good Title.—A contract to furnish a perfect title to land is satisfied by a deed conveying a good and perfect title, and it is not necessary that an abstract showing a perfect title should be furnished.—Smith v. First Nat. Bank, Tex., 95 S. W. Rep. 1111.

130. WORK AND LABOR—Evidence.—In an action by an architect to recover his fees, evidence held to sustain judgment for plaintiff.—Evans v. Philadelphia Bourse, Pa., 64 Atl. Rep. 463.